Supreme Court of the United States

OCTOBER TERM, 1901.

No. 251.

I. STANTON CARTER, on Behalf of OBERLIN M. CARTER, Appellant,

vs.

ROBERT W. McCLAUGHRY, Warden, etc., Appellee.

APPEAL FROM CIRCUIT COURT, DISTRICT OF KANSAS.

Reply Brief on Behalf of Appellant, Filed by Leave of Court.

I.

The point made on page 17 of appellee's brief, that appellant should have traversed the return, is disposed of by the case of Seavey *vs.* Seymour, 3 Cliff., 439, 455.

Had appellee quoted the section next but one following the one cited from Church in his brief at page 17, the court would have been fully advised as to the law applicable.

II.

Replying to the objection that appellant did not refer to the 102d article of war, which forbids a second trial for the same offense, it is suggested that, in the view of appellant, that article is a work of supererogation. Appellant stands on the fifth amendment to the Constitution. Congress cannot detract from the rights guaranteed him by that instrument; and, knowing this, probably enacted the article as declaratory merely, and perhaps as a warning to military courts.

III.

On page 93 of its brief, appellee insists that appellant should have interposed a "plea" that he "was being twice tried for the same offense;" and on page 94 that "this plea was waived when the accused pleaded to the general issue"—meaning by the "general issue," we suppose, the plea of not guilty.

We reply that such a "plea" as the one suggested prior to the plea of not guilty is absolutely unknown to Anglo-Saxon law, either civil or military. The practice in criminal trials in common-law courts, where there are several counts in an indictment charging the same crime in different aspects, is to move the court to compel the prosecution, *at the close of the evidence*, to *elect* upon which count it will ask a conviction. No such motion is known to the law of courts-martial, nor any equivalent therefor. Indeed, the practice of charging the same offense under different articles is also unknown. If the court-martial should be of

opinion that the offense is laid under the wrong article of war, it is its duty to change it to a proper article.

Again, the accused could not be expected to know in advance that the court-martial would convict him more than once for the same offense. He was entitled to believe that the court would find properly and legally on the charges.

IV.

In the first charge and specification it is alleged that the entering into the contracts of 1896 was so conducted as to render such contracts fraudulent. If that be the contention of the Government, then the remaining three charges are void on their face, because these latter charge the accused with having committed a crime *for not having carried out these very fraudulent contracts.*

Both of these things cannot, in their nature, be crimes. If the contracts were fraudulent, then it could be no offense *not* to carry out their terms. If they were valid, then there could have been no conspiracy in entering into them.

In the case of Greene *et al. vs.* Henkel, at this term, the whole contention of the Government was that these identical contracts were fraudulent. Having assumed this position, the appellee here is bound thereby. It cannot be allowed to blow hot and cold at the same time.

If these contracts are fraudulent, how is it possible for it to be a crime on the part of appellant *not* to carry out the provisions thereof? And if this proposition be true, the second, third, and fourth charges go out of this case, and the appellant has been punished *three* times for one offense.

V.

The finding of guilty under the IV charge is void for the following additional reasons:

(*a.*) Sec. 5488, R. S. U. S., was enacted June 14, 1866.

The 62d article of war was taken from the Articles of the Earl of Essex, A. D. 1642, 2 Winthrop Mil. Law, p. 1118 (2d ed.). It was first enacted in the United States in the Continental Articles of 1775, in the precise terms now used, as article 50. (See 2 Winthrop, 1484.) It was re-enacted in the Code of 1806 as article 99.

It is submitted that inasmuch as the present article 62 has been in force since our Revolution, and since section 5488 was born as late as 1866, it is against all principles of construction of criminal statutes that the younger law should be imported into the older by *implication* merely.

(*b.*) The fact that Congress provided for a specific kind of embezzlement by article 60 is an implied prohibition against courts-martial having jurisdiction over any other kinds of embezzlement.

The first army embezzlement statute appears in the Articles of War of 1806 as article 39, in these terms:

"Every officer who shall be convicted * * * of "having embezzled or misapplied any money with which "he may have been entrusted, for the payment of men under "his command * * * or for other purposes," &c.

This was superseded by the act of 1863, known now as article 60.

It is submitted that Congress having legislated for the

army on the subject of embezzlement by the enactment of article 60, it intended to cover thereby the entire subject, so far as courts-martial are concerned.

(*c*.) Carter was *not* a disbursing officer; he was a purchasing agent. The specification under charge I shows that the contention of the Government before the court-martial was that he was charged with the purchase from the Atlantic Contracting Company of certain materials named, and that the fraud consisted in his accepting material inferior to that called for by the contracts. Whether or not the materials were inferior and less costly than those called for by the contracts was a matter of judgment and opinion. If we assume they were inferior, the payment for them does not bring appellant within the meaning of section 5488. The phrase there is intended to comprehend such officers as assistant treasurers, paymasters, and the like, but in these charges it appears that Carter was simply buying material, brush and stone; he was simply a purchasing agent.

To illustrate: The marshal of this court is charged with the duty of making certain purchases for the use of the court. Suppose some person, we will not say some envious person, but some person actuated by a supposed sense of duty, should charge him with having paid 5 per cent. over the market price for such supplies, or that such supplies were not quite up to the required standard. Let us further assume that the marshal had acted in the most perfect good faith in his purchases (and it must be borne in mind that *intent* is no part of section 5488); and, finally, let us suppose that some witness was produced who would swear that in his opinion the marshal had paid 5 per cent. in excess of the

market price, or that the supplies did not quite come up to the prescribed standard. Can he be convicted and sentenced to ten years in the penitentiary for a mere error of judgment? Is it supposable that Congress intended any such monstrous injustice?

VI.

The argument under the III head of appellant's brief is greatly reinforced by the fact that this court has practically overruled the Claasen case, 142 U. S., 140, cited on page 98 of appellant's brief, by the case of Ballew, 160 U. S., 187, 203.

The punishment in the Ballew case was two years at hard labor. (See volume 15, Transcript of Records in the clerk's office of this court.) This sentence was *less* than might have been inflicted under either of the two counts. This court however, reversed the Ballew case and remanded it for a resentence.

All of which is respectfully submitted.

FRANK P. BLAIR,
Attorney for Appellant.

H. G. STONE,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

I. STANTON CARTER (ON BEHALF OF Oberlin M. Carter), appellant,
v.
ROBERT W. MCCLAUGHRY, WARDEN of the United States Penitentiary at Fort Leavenworth, Kans.
No. 567.

BRIEF OF THE SOLICITOR-GENERAL IN OPPOSITION TO THE APPLICATION FOR BAIL.

STATEMENT.

Oberlin M. Carter was a captain of the United States Army, assigned to the Corps of Engineers, and from April, 1888, to July, 1897, was in charge of the river and harbor improvement in the Savannah, Ga., district. He was arraigned and tried before a court-martial in Savannah, Ga., convened according to law, upon certain charges and specifications, and was convicted of four different offenses committed by him while in the military service of the United States, namely, conspiring to defraud the United States, in violation of the sixtieth article of war; causing false and fraudulent

claims to be made against the United States, in violation of the sixtieth article of war; conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war; and embezzlement, as defined in section 5488, Revised Statutes of the United States, in violation of the sixty-second article of war. He was thereupon sentenced by the court-martial to suffer a fine of $5,000; to be imprisoned at hard labor for five years; to be dismissed from the service of the United States, and to the publication of his crime and punishment as prescribed by statute upon a dismissal for fraud. This sentence was approved by the Secretary of War and confirmed by the President of the United States September 29, 1899.

On October 2, 1899, pending the execution of the sentence, Carter obtained from the circuit court of the United States for the southern district of New York a writ of habeas corpus, directed to the military authority having him in custody, for his production before the court, together with the time and cause of his detention. He was accordingly produced, and due return made, setting up that he was lawfully held in custody by authority of General Orders, No. 172, of September 29, 1899. During the pendency of the habeas corpus proceedings the fine imposed was paid. The circuit court (Judge Lacombe) dismissed the writ, and Carter was remanded to custody October 20, 1899. (Rec., p. 85; 97 Fed. Rep., 496.)

From this final order the petitioner prosecuted an appeal to the United States circuit court of appeals for

the second circuit (Wallace and Shipman, JJ.), which, on January 24, 1900, rendered a decision (Wallace, J.) *affirming the judgment* of the circuit court. (Rec., p. 97; 99 Fed. Rep., 948.)

On February 5, 1900, an application for a writ of certiorari to the circuit court of appeals was made to this court, which, on February 26, 1900, was denied. (176 U. S. 684.)

On the same day the writ was denied an appeal from the final order of the circuit court directed to this court was allowed by a judge of the circuit court, as also a writ of error. Thereafter a motion was filed by the Solicitor-General to dismiss or affirm, and on April 23, 1900, this court dismissed the appeal and writ of error. (177 U. S., 496.)

Respecting the general authority of courts-martial, the court, speaking by Mr. Chief Justice Fuller, said (p. 497):

> The eighth section of Article I of the Constitution provides that the Congress shall have power "to make rules for the government and regulation of the land and naval forces," and in the exercise of that power Congress has enacted rules for the regulation of the Army known as the Articles of War. (Rev. Stat., sec. 1342.) Every officer before he enters on the duties of his office, subscribes to these articles, and places himself within the power of courts-martial to pass on any offense which he may have committed in contravention of them. Courts-martial are lawful tribunals, with authority to finally

> determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced.

In accordance with the sentence of the court-martial, Carter was taken to the United States penitentiary at Fort Leavenworth, where he was received on April 27, 1900, and where he has since been confined.

On October 17, 1900, the application for a writ of habeas corpus, now before the court on appeal, was filed in the circuit court of the United States for the district of Kansas (Rec., pp. 1 to 31), and on November 5, 1900, an amendment to the application was filed (Rec., p. 32). The return of the warden set forth that Carter was being held in custody by authority of General Orders No. 172, of September 29, 1899, which was before this court both on the application for the writ of certiorari (176 U. S., 684) and on the motion to dismiss or affirm the appeal and writ of error (177 U. S., 496).

The court (Thayer and Hook, JJ., the latter delivering the opinion), dismissed the writ and remanded the prisoner (Rec., p. 102). The only additional fact before the court on this last application was that contained in the amendment (Rec., p. 32), namely, that on December 9, 1899, Carter, together with Greene and the Gaynors, was indicted in the United States district

court for the southern district of Georgia of a conspiracy to defraud the United States, which indictment was based on the same facts set out in the charges and specifications of which Carter was convicted.

Judge Hook, in his opinion dismissing the writ, states (Rec., p. 104) that "the merits of Carter's case as presented were considered by the circuit court for the southern district of New York and by the circuit court of appeals for the second circuit," but points out that "while the judgments of those courts are recognized as of highly persuasive authority, they do not amount to *res adjudicata*, nor prevent a reexamination of the same questions in a subsequent habeas corpus proceeding." Respecting the action of this court on the two occasions when Carter's case was brought before it, he says that it was "confined to a denial of the application for a writ of certiorari, which is not allowed as a matter of right, and to the dismissal of the appellate proceedings without a consideration of the merits of the case." For this reason he goes on to consider the case on the merits, states that he is in entire accord with Judge Wallace, "that under the sixtieth article of war it was competent to impose a fine for one charge of which the accused was found guilty and imprisonment for the other"—the essential point made—and finally dismissed the writ.

From this judgment an appeal has been taken to this court, and pending the hearing of the appeal an application is made for the admission of Carter to bail.

ARGUMENT.

The validity of Carter's conviction and sentence by the court-martial, which alone could try him for crimes committed as an officer of the United States Army in violation of the Articles of War, has been sustained by three civil courts and five judges, not counting this court, before which the matter is now pending for the third time. Carter now applies for the suspension of the just sentence of this "lawful tribunal" (177 U. S., 497), and asks to be released from imprisonment pending the hearing of this second appeal, upon the following grounds:

First. Because he is suffering from neurasthenia and is on the verge of nervous collapse by reason of mental anguish, owing to his imprisonment.

Second. Because he is innocent of the charges of which he was convicted by the court-martial (see application, p. 9), and the only way he can establish his innocence, so he says, is by pressing to trial the charges embraced in the Georgia indictment, which he asserts can not be tried because of his absence from Georgia.

It might be pointed out that these grounds are hardly consistent. A man suffering from neurasthenia and on the verge of nervous collapse is hardly in a condition either to prepare his case for trial or to undergo the worry and anxiety of a prolonged criminal prosecution. My limited experience leads me to believe that a quiet retreat, with light work, is to be preferred to the fret and worry of a court room for a person afflicted with a nervous trouble.

The fact that Carter's "temperament and sensibili-

ties" are such that imprisonment, as he says, "engenders a mental suffering impossible to be told," affords no reason for his release on bail. This is obvious. Otherwise, the very man who ought to be punished most severely, the man who has abused the greatest trust—whose training ought to have kept him from crime—for whom there is the least excuse, is the very one who will have the strongest case for relief, for he will worry most over his imprisonment along with common criminals. In this connection, however, I might point out that the mental anguish a man of Carter's former standing suffers is not due so much to mere confinement as it is to the infamy which attaches to a convicted criminal.

So much for this ground of relief, giving it all the force ascribed to it in the application. But on reading the affidavits filed by Carter, I directed the United States attorney for Kansas to have a thorough examination by competent physicians made of Carter's condition. He did so promptly and I have the result. He took with him to Leavenworth, Dr. Jacobs, of Emporia, Dr. Munn, of Topeka (who, he says, are perhaps the two most prominent physicians in Kansas), and in Leavenworth secured the services of Drs. Lane, Phillips, and Wever. These physicians made a careful examination of Carter and embodied the result of it in an affidavit in which they give in detail the facts bearing upon his physical and mental condition. Their general conclusion is as follows:

> Affiants further say that said Carter is not now suffering from neurasthenia; that he is not

on the verge of nervous collapse; that his nervous condition is not greater than we would expect to find in a healthy person of said Carter's standing confined in prison.

Affiants further say that said Carter is now physically and mentally sound.

The fact that Carter is now physically and mentally in good condition is confirmed by the affidavits of the warden and the prison physician. The latter states that Carter is hospital clerk and has charge of the greenhouse; that by reason of this fact he comes into daily contact with Carter, and that Carter is now physically and mentally sound, capable of attending to his duties and daily performing the same. A copy of these affidavits is attached as an appendix to this brief.

As to the second ground for release on bail, it is pertinent to inquire in what way Carter can establish his innocence of the charges of which he was convicted by a court-martial, through a trial on a criminal indictment in the United States court in Georgia. Would acquittal by a jury on a criminal trial operate as a reversal of the conviction by the court-martial? Will this court upon this application for bail take the view that a jury in the United States court in Georgia can determine whether the court-martial rightfully convicted Carter? To put these questions is to answer them. The fact that Carter is under indictment along with his co-conspirators has no relevancy in the consideration of this appeal or of the application for bail. But since Carter has dragged into this case the fact that he is under indictment along with Greene and

the Gaynors, and has sworn that the criminal case can not be tried because of his absence from Georgia, and asserts that he wants to be released so he may demand a trial by jury in Georgia, and prepare for it, it is proper for me to call the attention of the court to the fact that if the criminal case can not be tried without Carter, neither can it be tried without his co-conspirators, Greene and the Gaynors. Yet, ever since the indictment was found, in December, 1899, the Government has been strenuously endeavoring to secure the removal of Greene and the Gaynors from New York to Georgia for trial. In the desperate fight which Carter's co-conspirators have made against removal and trial before a jury, the United States has been compelled to produce before the commissioner in New York thousands of pages of testimony tending to prove the guilt of Carter and his associates. Over a year has been consumed in the introduction of testimony. The United States have been compelled, virtually, to try the case before the commissioner in order to secure the warrant for removal. And the matter has not yet been determined. Greene and the Gaynors are still in New York. It will be time enough for Carter to say that he is ready to go to Georgia for trial when his co-conspirators show by their conduct that they are willing to face a jury upon these charges.

And now, since Carter so vigorously asserts his innocence and makes his desire to establish it a principal reason for his release on bail, let me say that the Government, since Carter was tried and convicted by the

court-martial, have not ceased in the investigation of the fraudulent transactions in which he and his co-conspirators were engaged. In order to secure a warrant for the removal of Greene and the Gaynors to Georgia for trial, the Government procured and presented to the commissioner in New York, not the fleeting proof of oral testimony, but documentary evidence, books and papers, of enduring force, which demonstrate that Carter and Greene and the Gaynors, between January 3, 1893, and July 17, 1897, defrauded the Government of $2,169,159.06.

The division of this "swag" was attended to by Carter personally. When the time came to make a payment under the contract, Carter, who was located at Savannah and had charge of the work on behalf of the Government, would give to the representatives of Greene and the Gaynors, locally in charge at Savannah, a Government check sufficient to pay for the labor and materials which actually went into the improvement, and then he would draw a Government check for the excess of the contract price, representing what gamblers would call "the velvet"—the fruit of the fraudulent conspiracy—and putting this in his pocket, would go to New York. There he would meet Greene and the Gaynors. Then the division would take place. Carter would be specially allowed out of the amount $75 for traveling expenses and the balance would be divided into thirds—one-third going to Carter, one-third to Greene, and one-third to the Gaynors. In this way Carter drew out of the

conspiracy $722,528.02, and of this amount the records of stock-brokers in New York show that he invested in stocks and bonds $690,301.85. For his traveling expenses Carter received $1,575. He made twenty-one trips to New York on this mission and at the close was in excellent condition, financially, to be appointed military attaché at the Court of St. James.

I have seldom read a more interesting and romantic story of crime than is presented in this testimony. Is it any wonder that Carter and his associates have been able, with the money thus obtained, to fight this case the way it has been fought? Is it any wonder that appeal follows appeal and one eminent counsel succeeds another in the defense of this man? The Government knows that Carter had nearly $700,000 in stocks and bonds at the time suspicion was directed to his transactions. Where these stocks and bonds are now, or where the bulk of them are, it is to be presumed the Government does not know, or it would lay its hands on them. Is it any wonder that Carter wants to get out on bail? Is it any wonder that he desires to be put in a position where he can personally handle the sinews of war? What bail can the court fix that will be sufficient in his case, if he has sent his securities out of the country and made up his mind that the best thing he can do is to follow them?

JOHN K. RICHARDS,
Solicitor-General.

APRIL 15, 1901.

APPENDIX.

UNITED STATES OF AMERICA,
State of Kansas, ss:

I. E. Lambert, of lawful age, being first duly sworn, on oath, says: That he is the district attorney for the district of Kansas; that he is well acquainted with Drs. J. L. Wever, D. R. Phillips, and A. J. Lane, of Leavenworth, Kans., and they are leading physicians of the city of Leavenworth; that he is well acquainted with Dr. L. D. Jacobs, of Emporia, and Dr. L. H. Munn, of Topeka, Kans.; that they are leading physicians of the State of Kansas, with reputations for skill and ability coextensive with the State The former is one of the physicians and surgeons of the Atchison, Topeka and San Fe Railway Company, and the latter is chief surgeon of the Chicago, Rock Island and Pacific Railway Company.

I. E. LAMBERT.

SHAWNEE COUNTY, *ss:*

Subscribed and sworn to before me this 11th day of April, 1901.

[SEAL.] FRANK L. BROWN, *Clerk*,
By HELEN BUCKMASTER, *Deputy*.

UNITED STATES OF AMERICA,
State of Kansas, ss:

Dr. J. L. Wever, Dr. L. D. Jacobs, Dr. L. H. Munn, Dr. J. H. Lane, and Dr. Phillips, of lawful age, being first duly sworn, each for himself, says:

That he is a physician and surgeon; that at the request of the United States district attorney for Kansas, called upon Capt. Oberlin M. Carter, now confined in the Federal penitentiary at Fort Leavenworth, State of Kansas, for the purpose of making an examination of said Carter for the purpose of obtaining his physical and mental conditions.

Affiants further say that they made a careful examination of said Carter at said Leavenworth prison. After reaching said prison they were conducted to the office of Dr. McDill. Said Carter came to the room. After some conversation with him as to his nativity, the age of his mother, the age at his death of his father, and about some of his early associates—this for the purpose of estimating his mental stability—

We found, having in the meantime stripped him of his clothing, that his age was 44; his height 5 feet 9 (his own statement). We then took him to a pair of scales and weighed him, and found his weight to be 165 pounds. After, his pulse was counted and found to range from 90 to 96. After going down stairs and coming up and during the whole course of the examination there was no change in the pulse rate, it varying from 90 to 100. His temperature was 99, his respirations 19. His general appearance and general nutrition were good. There were no muscular tremors, no dyspnœa, no hiccough. His skin was clear, clean, moist, and supple. His sclerotic was not discolored. His pupil responded normally to light and accommodation. At no time during this examination was there any dilation or unstability of the pupillary reaction.

Measurements were made through the largest part of the arm, forearm, thigh, and leg, and found to be: Right arm, 11½ through biceps; right forearm, 11; left arm,

11, and left forearm, 10¼; right thigh, 19½, middle of middle third; left, 19¼; large portion of right-leg calf, 14; left, 14.

There were no trophic vasomotor or atrophic changes; Romberg's test negative. He performed the complicated act of buttoning and unbuttoning pants normally; he touched objects and nose normally. The cilio-spinal reflex was normal; the superficial reflexes, epigastric, cremasteric, and plantar were normal. There was no ankle clonus; the brachial and knee reflex was normal. The thermic sense, as was shown by blowing upon different portions of the body, was fully appreciated and differentiated by him.

No electrical tests were made or deemed necessary.

His tongue was clean and moist; there was no increased or diminished area of hepatic or splenic dullness. There was no tympanitis or tenderness of abdomen. The sphincter ani was firm; there were no external or internal pile tumors. Inspection, palpitation, percussion, and auscultation of chest were negative. Measurement of chest at fourth rib 35½ inches; measurement of abdomen level of umbilicus was 31¾. The area of cardic dullness normal; apex between 2½ inches below and ½ inch within nipple line; auscultation negative. Chest expansion 2½ inches.

There were no œdemas, no evidences of anæmia; the specimen of urine passed in our presence at 1.20 was clear, light amber in color, acid; specific gravity, 0.1018; no albumen by heat and nitric acid; no sugar by Fehling's test.

There were no areas of hyperæsthia or anæsthesia; no hyperogenic zones; no contraction of visual field; but the man manifested some emotional symptoms.

Affiants further say that said Carter is not now suffering from nuerasthenia; that he is not on the verge

of nervous collapse; that his nervous condition is not greater than we would expect to find in a healthy person of said Carter's standing confined in a prison.

Affiants further say that said Carter is now physically and mentally sound.

(Signed.) J. L. WEVER.
L. D. JACOBS.
D. R. PHILLIPS.
L. H. MUNN.
JAS. A. LANE.

Sworn to and subscribed before me this 10th day of April, 1901, at Fort Leavenworth, Kansas.

[SEAL.] JOHN C. RIPLEY,
Notary Public.

My commission expires September 1, 1904.

UNITED STATES OF AMERICA,
State of Kansas, ss:

David McDill, of lawful age, being first duly sworn, upon oath says:

That he is prison physician at the United States penitentiary located at Fort Leavenworth, State of Kansas; that he has filled said position since August 1, 1900; that he is well acquainted with Oberlin M. Carter, now confined in said penitentiary; that said Carter is hospital clerk and has charge of the greenhouse, and by reason of that fact this affiant comes in daily contact with said Carter.

Affiant further says that said Carter is now physically and mentally sound, capable of attending to his duties, and daily performing the same.

DAVID MCDILL.

Sworn to and subscribed to before me this 10th day of April, 1901, at Fort Leavenworth, Kansas.

[SEAL.] J. C. RIPLEY, *Notary Public.*

My commission expires September 1, 1904.

UNITED STATES OF AMERICA,

State of Kansas, ss:

R. W. McClaughry, of lawful age, being first duly sworn, upon oath says:

That he is warden of the United States Penitentiary located at Fort Leavenworth, State of Kansas; that as such warden he has in custody Oberlin M. Carter.

Affiant further says that since Carter's confinement in said prison he has met him several times each week and almost daily.

Affiant further says that, as far as he can observe, said Carter is now physically and mentally in good condition, except that at times the said Carter manifests a very nervous condition.

R. W. MCCLAUGHRY, *Warden.*

Sworn to and subscribed to before me this 10th day of April, 1901, at Fort Leavenworth, Kansas.

[SEAL.] J. C. RIPLEY, *Notary Public.*

My commission expires September 1, 1904.

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No. 567. 251.

Sol. of Atty. Gen. (Richards) for Appellee (Corcoran)

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk

Filed April 20, 1901.

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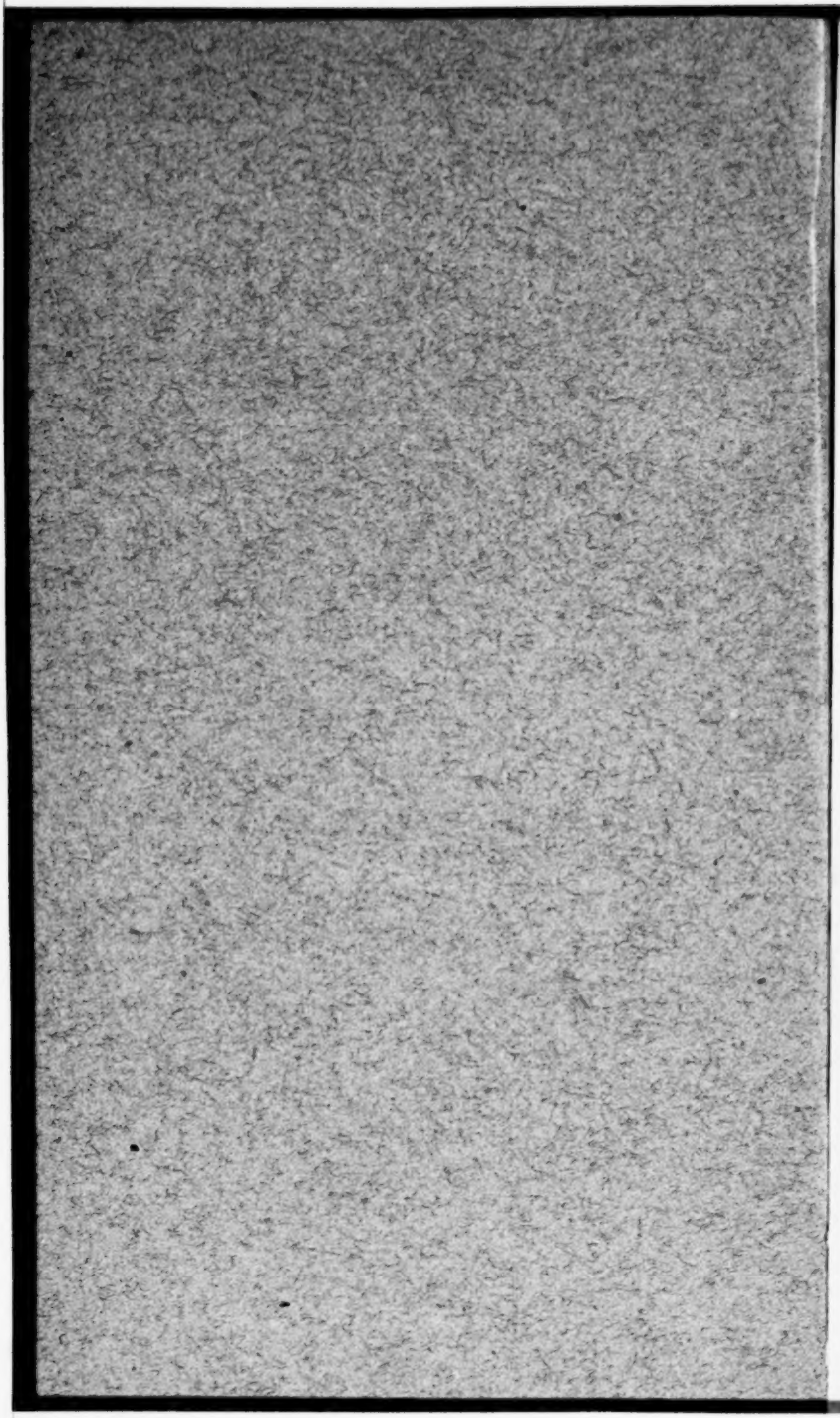
No. 567.

REPLY OF THE SOLICITOR-GENERAL TO THE MOTION TO STRIKE FROM THE FILES.



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REPLY OF THE SOLICITOR-GENERAL TO THE MOTION TO STRIKE FROM THE FILES.

The Solicitor-General, replying to the motion to strike his brief from the files "as irrelevant and scandalous," begs to say that he yields to no one in respect for the court or regard for the proprieties of practice. He always tries to observe strictly the rule that in the discussion of a case before the court counsel must confine himself to the facts which appear in the record. But he does not understand that that rule has any application to the present motion. The question now before the court is not whether the court-martial which convicted Carter had jurisdiction to impose the punishment of imprisonment which he is undergoing at Leavenworth, but whether, under the existing circumstances, he ought to be admitted to bail pending the hearing of his appeal.

The latter question has not been submitted to the court upon the record in the appeal, but upon the application of Carter supported by the affidavits of certain physicians and by his own. By this application and these affidavits Carter and his counsel raised questions entirely outside the record in his appeal. They averred—

First. That his health is impaired.

Second. That he is an innocent man, and wants to be released in order to be tried in the criminal case in Georgia.

The falsity of the first statement was established by the affidavits of five physicians in addition to those of the warden and the prison physician.

To demonstrate the falsity of the second statement it was necessary for the Solicitor-General to state briefly what the Government has done up to this time in the prosecution of the criminal indictment pending against Carter and his coconspirators in the United States court in Georgia. The facts stated appear in the documentary evidence presented by the Government to the United States commissioner in New York upon the hearing of the application for the removal of Greene and the Gaynors to Georgia for trial upon the criminal indictment. If counsel is unaware of this, it is because he has not consulted with the gentlemen who represented Carter on the former hearings before this court, and are now representing Carter's coconspirators in the bitter fight they are making against being removed to Georgia for trial.

Believing, from the facts in his possession, that Carter wants to get out neither for his health's sake nor in order to be tried upon the criminal charge in Georgia, the Solicitor-General has laid before the court the facts which, in his opinion, make clear the real object of this application. For this he has no apology to make. It is not his belief that a convicted criminal may assail the Government he has defrauded, and assert on oath whatever he pleases in support of his application to be released from punishment, while the representative of the Government before this court must stand mute and permit the charges and statements, however reckless and false, to go unchallenged to the court.

Recurring to the application, permit me to say in conclusion that the only feature which entitled it to notice was its audacity. Its supposed reasons were worthless; its alleged facts wholly without support. Taken at its best, the argument amounted to this: That Carter, having been convicted by one tribunal, should be released on bail—and thus while at large serve out a sentence already justly imposed—in order that he may be tried before another tribunal. Time enough for him to be released for another trial when he has served out his present sentence.

JOHN K. RICHARDS,
Solicitor-General.

APRIL 20, 1901.